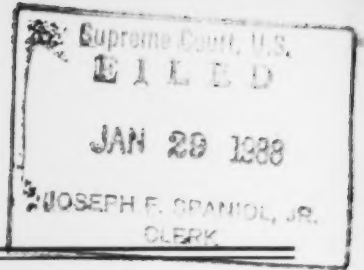


(3)
No. 87-1114



**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1987

C. PETER WHITMER,

Petitioner,

vs.

THE STATE BAR OF ARIZONA,

Respondent.

**OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA**

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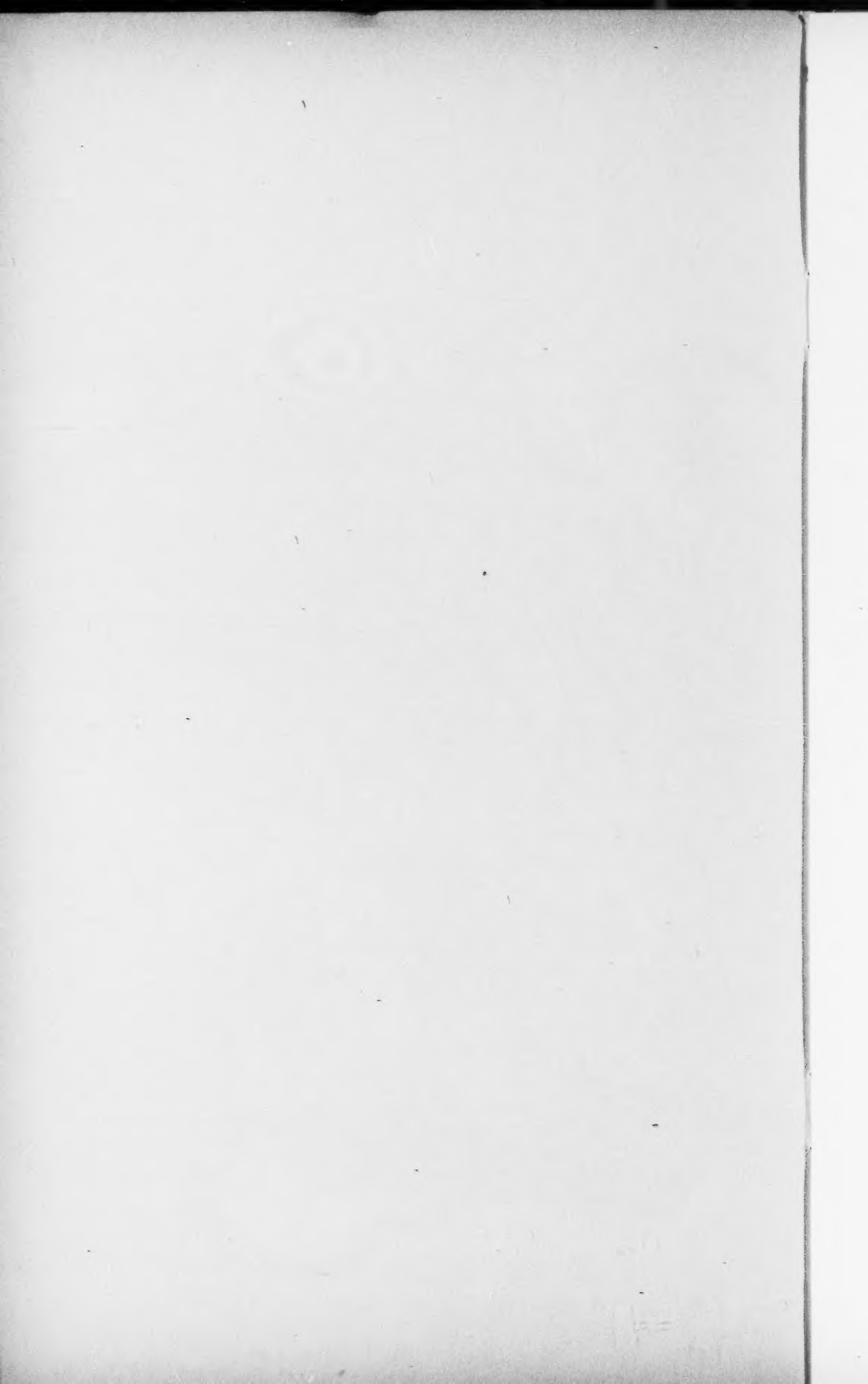


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STATEMENT OF THE CASE

This case began in 1981 when several former employees of the petitioner's law firm complained to the State Bar of Arizona that the petitioner and his partner routinely engaged in various unethical practices. During 1981 the State Bar also began receiving complaints from lawyers and citizens about petitioner's advertisements. Special Administrative Committee S-25 (the "Committee") was appointed in 1982 to consider these complaints.

Under the rules of the Arizona Supreme Court then in effect, each disciplinary committee was authorized to appoint one or more members of the Arizona Bar to serve as bar counsel. The function of bar counsel was two-fold: to assist the disciplinary committee in its investigation of charges, and to present evidence to the committee at the formal disciplinary hearing. *See* Petition Appendix F, at 15.

The Committee appointed four Arizona attorneys to act as bar counsel in this case. These attorneys assisted the Committee in its investigation of petitioner's conduct, reporting the results of their investigation in three meetings held with the Committee during October and November of 1982. On December 11, 1982, having found probable cause to believe that petitioner had committed ethical violations, the Committee issued a ten-count complaint against the petitioner and his partner. Petition Appendix A, at 3. The issuance of the complaint and the investigation that preceded it complied in all respects with the governing rules of the Arizona Supreme Court. *See* Petition Appendix F.

The petitioner responded to the complaint by filing various motions that were not finally resolved until the

Arizona Supreme Court denied petitioner's request for interim relief in June of 1983. During the six-month hiatus between issuance of the complaint and final resolution of petitioner's motions, bar counsel had continued their investigation of charges against the petitioner, as permitted by the Arizona rules. Thus, when petitioner's motions were finally denied and the Committee was ready to resume the proceedings, bar counsel had six months of additional investigative findings to report.

A one-hour meeting was held for this purpose on July 5, 1983. Bar counsel reported the results of their investigation, recommended that several charges against the petitioner be dropped, and suggested that one charge be added to the complaint. Petition Appendix A, at 3-4. The Committee received bar counsel's report but did not discuss it in bar counsel's presence. There was no discussion of the weight or sufficiency of the evidence against petitioner, nor of how the Committee should respond to the investigative findings. After meeting privately, the Committee issued a first amended complaint. *Id.*

No further investigative contacts occurred between bar counsel and the Committee. During the next six months the parties engaged in vigorous discovery, including numerous depositions and the production of thousands of documents. Petitioner also filed several additional motions.

The formal hearing before the Committee began on January 23, 1984, more than six months after the July 5 meeting between the Committee and bar counsel. Petitioner was represented throughout the hearing by two attorneys. The hearing lasted more than nine days and

produced more than 2,000 pages of transcript. The Committee, which had no power to discipline the petitioner but could only recommend factual findings and appropriate discipline to the Arizona Supreme Court, deliberated for more than six months before finding that petitioner had committed several ethical violations. The Committee recommended that petitioner be suspended from practicing law for 180 days. Petition Appendix C.

The petitioner appealed this recommendation to the State Bar Disciplinary Commission (the "Commission"), a nine-member panel consisting of six lawyers and three non-lawyers. Like the Committee, the Commission could only recommend factual findings and appropriate discipline to the Arizona Supreme Court. The Commission heard arguments on May 11, 1985. Petitioner was again represented by two attorneys. Petitioner also made a statement to the Commission and answered questions.

The Commission issued its recommendation on February 4, 1986. The recommendation disagreed with the Committee on two charges, suggested that those charges be dismissed, but otherwise endorsed the Committee's proposed factual findings. The Commission recommended that the petitioner be suspended from practicing law for 90 days. Petition Appendix B.

The petitioner appealed to the Arizona Supreme Court, arguing, among other things, that the July 5, 1983 meeting between bar counsel and the Committee denied him due process of law. Although the petitioner now alleges that "numerous" *ex parte* contacts occurred between the Committee and bar counsel, *see* Petition at 8, only one such meeting was challenged before the Ari-

zona Supreme Court.¹ In a highly unusual development, the Arizona Supreme Court adjourned its proceeding for 45 days to allow the petitioner to conduct a thorough investigation and discovery of all aspects of the July 5 meeting. The petitioner served detailed interrogatories on all four bar counsel, all three members of the Committee, and the State Bar of Arizona. These interrogatories were answered in full. Having previously deposed one bar counsel with respect to the July 5 meeting, petitioner elected to take no further depositions. When the petitioner filed a supplemental brief at the close of this 45-day period, he was unable to identify any evidence of bias or prejudice on the part of the Committee or bar counsel. Petition Appendix A, at 2-9, 37 n.6.

The Arizona Supreme Court rejected petitioner's due process argument, finding as a matter of fact that the disciplinary proceedings were not biased or unfair. The court, which acted as a *de novo* finder of fact under the applicable rules, also found that petitioner had engaged in false and misleading advertising. Petitioner was suspended from the practice of law for 30 days, a suspension he has now completed. *Id.* On January 5, 1988, petitioner was reinstated as an active member of the Arizona Bar.

The rules governing bar disciplinary proceedings have now been changed by the Arizona Supreme Court.

¹ As noted above, three additional meetings were held *before* the formal complaint was issued against petitioner in December of 1982. The petitioner did not challenge these meetings in his arguments to the Arizona Supreme Court, *see* Appendix at 3-4, presumably because they are akin to the *ex parte*, probable-cause hearings that occur between judges and prosecutors whenever arrest or search warrants are issued. *See Withrow v. Larkin*, 421 U.S. 35, 56 (1975).

The changes did not result from this case; they were made before the petitioner's claim reached the Arizona Supreme Court. Under the new rules, the investigative portion of disciplinary proceedings is separated from the adjudicatory phase, with bar counsel participating only in the latter. Thus, under procedures now in effect in Arizona, bar counsel no longer report their investigative findings to disciplinary committees. *See* Petition Appendix A, at 37 n.1.

REASONS FOR DENYING THE WRIT

This case is fact specific. The petitioner asks the Court to review a unique set of facts and declare them a denial of due process of law. The facts cannot recur in Arizona, and the petitioner has identified no other state which follows the abandoned Arizona system. No conflict among state or lower federal courts is suggested. No unique constitutional principles have been established by the decisions below. No additional guidance is needed in this due process area, for it is one in which the Court has already spoken. *See Withrow v. Larkin*, 421 U.S. 35 (1975).

After reviewing all of petitioner's discovery regarding the July 5 meeting and more than 2,000 pages of transcript, the Arizona Supreme Court found no evidence of bias or unfairness. The court's decision concerned due process questions to be sure, but it was based entirely on the unique facts of this case, as the following excerpt from the court's opinion demonstrates:

The July 5 meeting concerned probable cause and amendments to the complaint, not the merits of the charges. Furthermore, the July 5 meeting occurred more than six months before the

disciplinary hearing began. The broad discovery we allowed [petitioner] to conduct into the nature and content of the July 5 meeting uncovered no hint of unfairness or bias. *On these facts*, the July 5 meeting is indistinguishable from the ex parte investigations upheld in *Davis* and *Withrow*. We are unwilling to hold that four years of discovery, hearings, and appellate review, must be disregarded on the basis of an innocuous one-hour meeting.

Petition Appendix A, at 7–8 (emphasis added).

Straining for a question worthy of review, the petitioner contends that judges should not enjoy a relationship of trust and confidence with the prosecutors that appear before them. But the Arizona Supreme Court did not disagree with this proposition. The court instead searched the record for evidence of such a relationship in this case, and found none:

[Petitioner's] assertion that bar counsel enjoyed an improper relationship of trust and confidence with the Committee is unsupported by the record. Neither [petitioner's] discovery nor our search of the hearing record revealed any evidence of bias or of a confidential or favored relationship between the Committee and bar counsel. On the contrary, the record reveals a consistent effort by the Committee to be fair and impartial.

Id. at 8.²

² Because the Arizona court found as a matter of fact that no confidential, attorney-client relationship existed here, petitioner must argue that the mere assertion of the attorney-client privilege at the Committee level denied him due process of law. But the

Factual conclusions, not broad legal principles, formed the basis for the decision below. Those factual conclusions do not warrant review by writ of certiorari. Nor do they conflict with this Court's requirement in *Withrow* that parties attacking the fairness of a judicial or quasi-judicial proceeding produce some evidence of actual bias. *Withrow v. Larkin, supra*, 421 U.S. at 55. See also *Smith v. Phillips*, 455 U.S. 209, 216–217 (1982). The Arizona Supreme Court found that petitioner had produced no such evidence. See Petition Appendix A at 2–9. This case thus falls squarely within the “presumption of honesty and integrity” on the part of state adjudicators that this Court recognized in *Withrow*. 421 U.S. at 47. “Without a showing to the contrary, we assume that Committee members are ‘capable of judging a particular controversy fairly on the basis of its own circumstances.’” *Id.* at 55, quoting *United States v. Morgan*, 313 U.S. 409, 412 (1941).

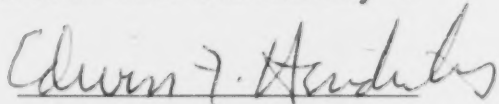
Nor should the Court grant review because the petitioner has alleged a conflict with *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). The Arizona Supreme Court did indeed state that if a due process violation had occurred at the Committee level it was cured by the impartial, *de novo* hearing at both the Commission and Supreme Court levels. But this conclusion was set forth as an

Arizona Supreme Court held the privilege had been asserted improperly and allowed the petitioner to conduct full and thorough discovery of all contacts between the Committee and bar counsel. Petitioner is therefore reduced to arguing that due process is denied by the mere assertion of the privilege, even though the assertion was later held to be incorrect, full discovery was allowed, no confidential relationship actually existed, and no evidence of bias was discovered. An argument so closely tied to the narrow facts of this case does not warrant review by the Court.

alternative holding only. *See* Petition Appendix at 8. The Arizona court's primary reason for denying petitioner's claim was his failure to present evidence of even a "hint of unfairness or bias." *Id.* at 7. Thus, even if this Court were to decide that the alternative holding was wrong, the decision below would still stand on the Arizona Supreme Court's independent factual finding that no bias or unfairness infected the proceedings below. Moreover, whether the rationale of *Ward* would apply to the unique facts of this case is not a question of broad national importance worthy of this Court's attention.

The petition should be denied.

RESPECTFULLY SUBMITTED this 2nd day of
February, 1988.



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